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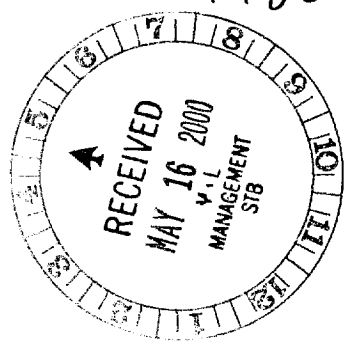

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF

OG&E ELECTRIC SERVICES

OG&E Electric Services ("OGE") respectfully submits these comments in response to the Surface Transportation Board's Advance Notice of Proposed Rulemaking ("ANPR") issued in this proceeding on March 31, 2000. OGE commends the Board for initiating this review of its rules related to rail mergers, and welcomes this opportunity to submit to the Board OGE's views regarding certain factors that the Board should include in the Notice of Proposed Rulemaking (NOPR) issued in this proceeding.

I.
Identity and Interest of OGE

OGE is an electric utility company with headquarters in Oklahoma City, OK. It has about 696,000 retail customers in Oklahoma and western Arkansas, and additional wholesale customers throughout the region. OGE owns and operates the Muskogee Generating Station located at Fort Gibson, OK and the Sooner Generating Station located at Red Rock, OK, both of which are coal-fired electric generating facilities utilizing coal from the Powder River Basin in Wyoming. The Muskogee Station is served via single line service by the Union Pacific Railroad Company ("UP"), and the Sooner Station is served in joint line service by the UP connecting with the Burlington Northern Santa Fe Railway Company ("BNSF"). OGE burns approximately

10 million tons of coal per year in total at these plants, and is highly dependent upon rail service for the delivery of fuel for the generation of its supply of electricity.

OGE has taken an active interest in Interstate Commerce Commission ("ICC") and STB rail merger proceedings. In 1995, OGE participated actively in the merger proceeding involving the Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company, and was the subject of a pro-competitive condition imposed by the ICC in that case, ICC Finance Docket No. 32549, Burlington Northern Inc., et al – Control and Merger – Santa Fe Pacific Corporation, et al, to preserve rail-to-rail competition at OGE's Sooner Generating Station. OG&E is a Party of Record in this proceeding.

II.
Comments

OGE's concerns relating to rail mergers are in two areas: service and competition. In the area of service, OGE is well aware that past rail mergers have been accompanied by serious service disruptions. OGE, as a large western rail shipper, has experienced firsthand the effects of service disruptions accompanying mergers in 1996 and 1997-98. While merging rail carriers have promised better service, they have frequently had severe difficulty in delivering on those promises. Thus, the Board should give any future rail mergers close scrutiny to determine the extent to which the promised benefits of any particular future merger are likely to be realized and timely relief to individual shippers when service deteriorates. In the area of competition, OGE is also aware that past rail mergers have created bottlenecks and the STB has attempted to address these specific circumstances during the proceedings. However, the STB needs to go beyond addressing merger-created bottlenecks and implement general rules providing that all captive customers of merging railroads shall be provided opportunity for relief. Relief could be granted

at the time of the merger if the condition restricting competition was created from the merger or at a time of contract termination, and also when conditions exist where the shipper is not provided with an opportunity for competition, such as pre-existing bottleneck situations.

A. The "Merger Rules" to Be Reviewed and Changed Go Beyond The Regulations Promulgated Specifically for Rail Mergers

While in the ANPR the STB referred to its "merger rules" and appears to define such rules as the regulations found at 49 CFR Part 1180.0 - 1180.9, the serious issues raised by parties during the hearing held by the Board in Ex Parte 582, Public Views on Major Rail Consolidation Procedures, and highlighted by the STB in the ANPR, require review of other, related STB regulations and rules established through adjudication, as well. This is particularly true if the policy objective of revisions to the applicable regulations is to enhance railroad competition, as the Board indicated it is considering in the ANPR. This policy objective cannot be realized if pro-competitive regulations are adopted for limited application to a merger consolidation. The result would be an unbalanced rail industry, where the merged railroad would be required to provide rates and service its competitors do not have to provide under the Board's current regulations and decisional rules. Examples include (1) Part 1144, Intramodal Rail Competition; (2) Part 1146, Expedited Relief for Service Emergencies; (3) Part 1147, Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies; and (4) the Board's "Bottleneck Rules." [1] Failure to review and revise these and other rules along with changes made to rules applicable in the merger context will not only create an unbalanced rail industry, it may provide a disincentive for railroads to merge at all. In summary, a broad review of all the Board's rules related to rates

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[1] See, Central Power & Light Co. v. Southern Pac. Transp. Co., Nos. 41242, et al. (Dec. 31, 1996), clarified (Apr. 30, 1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), reh'g denied (Apr. 20,

and service need to be reviewed for the purpose of establishing whether they will facilitate improved rail service and meaningful competition as the railroad industry continues to consolidate.

B. Specific Regulatory Changes That Should be Included in the Notice of Proposed Rulemaking

1. Require Merging Railroads to Provide, Upon Request, Rates over "Bottleneck" Railroad Segments That Are Created By the Merger and Pre-Existing Bottleneck Segments on the Merging Railroads

The STB should promulgate regulations that require merger applicants to provide rates and service terms upon request over all "bottleneck" segments of track in cases where (1) the merging railroad combines with a bottleneck railroad, thereby acquiring the full routing from an origin to a destination; and (2) there is an existing bottleneck on either of the merger applicants' systems where there is a current interchange between the merging carriers. In adopting such rules, the Board should require railroads to provide rates for bottleneck segments even if the bottleneck carrier and non-bottleneck carrier serve the same origin. More specifically, in its Bottleneck Decisions, the STB determined that a railroad need not provide a rate over a bottleneck segment of track if the bottleneck railroad and the non-bottleneck railroad that wishes to contract with a shipper for service over the non-bottleneck segment serve the same origin. However, since many mines in the Wyoming Powder River Basin – the primary source of coal for OGE and other coal shippers - are served by both UP and BNSF, the "same origin" restriction discourages many coal shippers from attempting to obtain a contract for service over non-bottleneck segments for combination with a bottleneck rate. This restriction should be eliminated.

1999), cert. denied sub nom. Western Coal Traffic League v. STB, 120 S. Ct. 372 (1999); Union Pac. R.R. v. STB, No. 98-1058 (D.C. Cir. Feb. 15, 2000).

Finally, if the Board wishes to enhance the competitive options of coal shippers as the industry continues to consolidate, the Board should reconsider its refusal in the Bottleneck Decisions to require railroads to provide rates over bottleneck segments of track even if a contract is not yet in place for transportation above or below the bottleneck.

2. Establish Remedies In The Event That Service Declines After a Rail Merger

Recent mergers have frequently resulted in substantial reductions in rail service levels to shippers after the merger was approved by the STB. In general, however, most coal-fired generating facilities can normally withstand no more than 30-45 days of deteriorated service before their coal inventories are depleted. Moreover, the Board must realize that, in the event of such deterioration, it is not enough for service levels to be restored to prior levels. Rather, service must be restored to a greater level to build inventories to levels that provide adequate insurance that electric power will continue to be supplied to wholesale and retail customers in the event of future rail service interruption.

Notwithstanding the need for service to improve as a result of major rail mergers, the Board's present merger policy and regulations permit some deterioration after a merger before the STB will act, and the Board has to date afforded merging railroads a substantial degree of deference in their representations regarding their ability to return service levels to pre-merger levels. This policy does not provide timely relief to shippers and unfairly places a large amount of merger implementation risk on the shoulders of rail customers. The Board's policies and regulations need to be changed to require more scrutiny of representations regarding service made by merger applicants, rules for timely relief on the part of shippers and expedited merger related complaint resolution on the part of the Board. In short, the Board should adopt and implement a policy of aggressively requiring the railroad industry to hold harmless rail shippers

and provide timely remedy. Some elements that should be included in the NOPR to help achieve this result are summarized below.

First, the Board should adopt regulations that require merging carriers to specify in the merger application what service levels are expected to exist on the merged carrier, and to state what actions the merging railroads will take if service levels deteriorate. Such a requirement would place the burden on merger applicants to convincingly and specifically demonstrate during the application review process how they intend to deal with post-merger service problems, subject to penalties for failure to do so. Second, the STB should adopt regulations that provide an expedited process for service complaint and resolution with penalties to the merging rail carriers for failure to remediate reduction in service to shippers in a timely manner.

The Board should also amend its service rules published at 49 CFR Parts 1146 and 1147. These rules put the onus on the petitioner to demonstrate that the service problems it is complaining of will not be rectified by the incumbent carrier "within a reasonable period of time." 49 CFR 1146.1(b)(1)(ii) and 1147.1(b)(1)(ii). The rules also require the petitioner to have an agreement in place with an alternative carrier and to demonstrate that the alternative service can be provided without degrading service to other customers of the incumbent and without "unreasonably interfering with the incumbent's overall ability to provide rail service." 49 CFR 1146.1(b)(1)(iii) and 1147.1(b)(1)(iii).

In order to advance a policy of improving rail service by enhancing competition and not tolerating any reductions in overall rail service as the industry continues to consolidate, the Board must amend these rules to (1) permit relief for any measurable reduction in rail service; (2) put the burden on the incumbent railroad to rebut a presumption that alternative service will

not interfere with its operations; and (3) impose penalties in the form of damages, including consequential damages, incurred as a result of the service deterioration.

3. Permit Reciprocal Switching and Trackage Rights from Terminal Points to Facilities Physically Connected to Only One Major Railroad

Another regulatory change that the STB should include in the NOPR is a presumption in rail merger cases in favor of reciprocal switching at a single rate in a terminal and a reasonable distance beyond the terminal for all connecting carriers. In setting the level of the rate, the Board should give substantial consideration to switching rate levels that enhance the competitive options available to shippers while covering the railroads' costs. Agreements between railroads regarding the level of the charge should be considered, but accepted by the Board only if the agreed-upon level enhances the feasible options of rail shippers after the merger.

Consistent with the above regulation and the policy goal of enhancing railroad competition in order to improve the industry as a whole, the Board should amend its competitive access regulations promulgated at 49 CFR Part 1144 to ease the criteria for a shipper to receive reciprocal switching and/or terminal trackage rights to a captive facility from interchanges within a reasonable distance from terminal areas served by the railroad and another carrier with the ability to provide rail service to the captive facility. Such rules would complement the rules requiring the establishment of rates over bottleneck segments of the merging railroads' track. The Board should explicitly overrule the "competitive abuse" standard for competitive access relief enunciated in the Midtec case, and publish rules that establish that the appropriate standard is a "public interest" standard, consistent with the statutory language. The requirement in § 1144.5(a)(1)(i) that there be an anticompetitive act before prescription can occur should be eliminated.

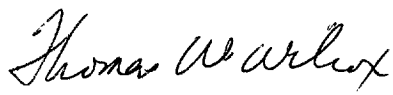
III.

Conclusion

OGE respectfully requests the Board to consider the views expressed herein, and thanks the Board for the opportunity to make OGE heard in this important proceeding.

Respectfully submitted

Nicholas J. DiMichael

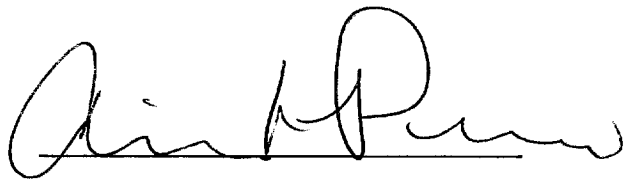


Thomas W. Wilcox
Thompson Hine & Flory LLP
1920 N Street, NW
Washington, DC 20036
(202) 331-8800
Attorneys for OGE Electric Services

May 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 16th day of May, 2000 a copy of the above Comments by first class mail postage pre-paid, to all parties of record.



Aimee DePew